No. 82 - 1938

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

STATE OF CALIFORNIA, et al.,

Petitioners,

vs.

STANDARD OIL COMPANY OF CALIFORNIA, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' REPLY TO AMICUS BRIEF OF THE UNITED STATES

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TABLE OF AUTHORITIES

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In its amicus brief, the United States does not quarrel with the substantive arguments made by the plaintiff states in their petition for certiorari. Instead, the United States argues that, "in its current

interlocutory posture, the decision presents no clearly defined legal issue of sufficient general importance to warrant review by this Court." Brief for United States at p. 6. We respectfully disagree with this conclusion.

The fact that our petition arises from an interlocutory appeal does not, of course, disqualify it for Supreme Court certiorari review; this Court can and often does review interlocutory questions decided by the courts of appeals. Certiorari will be granted on interlocutory appeal when, for example, the Court is called upon "to resolve an important and novel question in the administration of the antitrust laws." Pfizer, Inc. v. Government of India (1978) 434 U.S. 308, 311. Indeed, in the present case, the fact that these appeals arose under

28 U.S.C. section 1292(b) means that the district court twice certified, and the court of appeals twice agreed, that the district court's orders involved controlling questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the orders may advance the ultimate determination of the litigation.

This is not a case like Brotherhood of Locomotive Firemen v. Bangor and A.R.R. (1967) 389 U.S. 327, cited by the United States to establish this Court's "usual practice of declining to review interlocutory orders." Brief of U.S. at p. 11. There certiorari was denied because, after the court of appeals vacated a contempt order, this Court did not know whether the district court would reinstate the

orders of contempt. Here, both the lower courts have denied petitioners' claims, and nothing can or will change now in the district court following the Ninth Circuit's remand. Nevertheless, the United States suggests that plaintiffs should be required to litigate through an extremely expensive trial (not simply a contempt proceeding) that cannot in any way focus the legal issues raised in this petition, simply to buy an admission ticket to the Supreme Court to find out if the bulk of their claims have any validity.1/ Surprisingly, the United States suggests that this hurdle be placed before

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1/ At least 80% of petitioners' claims, and all of the class members' pre-parens patriae claims, 15 U.S.C. section 16c, were disallowed by the rulings below.

petitioners even though it recognizes that "[t]he court of appeals' decision may well have a significant effect on petitioners' ability to litigate a major portion of this case" (Brief of U.S. at p. 6.) and that "the requirement that petitioners offer proof on a dealer-by-dealer basis increases petitioners' litigation burden considerably and could lead petitioners to terminate a major portion of litigation that has consumed very substantial amounts of public resources." Brief of U.S. at pp. 9-10.

The United States' recognition of the burden of dealer-by-dealer proof is particularly apt. The courts below did not, as the United States suggests at pages 5 to 6 of its brief, find that petitioners failed to tender sufficient evidence of dealer control to avoid

Illinois Brick.[2/] Instead, the court of appeals held that any proof of control must examine individual dealers and thus that class treatment was impossible. In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation (9th Cir. 1982) 691 F.2d 1335, 1343. This requirement, that proof of Illinois Brick control must be several orders of magnitude more detailed than proof of the success of the conspiracy, mocks Illinois Brick's attempt to reduce the complexity of economic proof.

We believe that the United States fairly summarizes our contentions at pages 7 to 8 of its brief. However,

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2/ Illinois Brick Co. v. Illinois (1977) 431 U.S. 720 (97 S.Ct. 2061)

we must strongly disagree with the United States' assertion that the court of appeals has foreclosed Supreme Court review of these contentions by failing to address them. As the brief of the United States notes at page 8, fn. 7, the court of appeals did in fact assume that Illinois Brick applied, and both petitioners and respondents recognize that the court of appeals implicitly decided the Illinois Brick question. Thus, while petitioners may theoretically attempt again after trial to coax the court of appeals to decide the issue squarely, from any practical standpoint the questions in this appeal must be decided now or not at all.

We must therefore take issue with the United States' attempt to fit this case within the confines of the rule that "[t]his Court normally does not

review questions that were not decided by the court of appeals." Brief at U.S. at p. 8. The two authorities cited by the United States, United States v. Mitchell (1980) 445 U.S. 535, 546 n.7, and U.S. v. Lovasco (1977) 431 U.S. 783, 788-789 n.7, were in fact both instances where the trial court had not decided the issues brought to the Supreme Court, and this Court deferred ruling until after the trial court had passed on the questions. Here, of course, the trial court has decided the question explicitly and the court of appeals has done so implicitly. When a court of appeals partially decides and partially defers a question, this Court can and does grant complete review when such review would advance the cause of justice, Northwest Airlines, Inc. v. Transport Workers Union of America (1981)

451 U.S. 77, 86, particularly where important questions of statutory interpretation are involved. Id. at fn. 15.

Contrary to the argument of the United States, petitioners do not ask this Court to rule on factual propositions rejected by the court below. Instead, petitioners ask this Court to rule upon the legal implications of facts not in dispute. In particular, petitioners contend that the tautological conclusion that each dealer bought its branded gasoline exclusively from its franchisor implies, as a matter of law, that the Illinois Brick rule should not be read to deny claims for purchases from dealers. Secondarily, if this contention is rejected, the petitioners maintain that Illinois Brick control is established in this case by the dealers'

exclusive supply arrangements with their respective franchsors and by the observed and undisputed fact that, when respondents "restored" gasoline prices to higher levels, the dealers' retail prices moved from a relatively dispersed statistical range at the competitive level to a narrow, tightly confined statistical range at the supracompetitive level. These legal contentions were rejected by the court of appeals when it accepted the premise that Illinois Brick applied and insisted that Illinois Brick control cannot, under any circumstances, be proved on a marketwide basis.

In summary, we submit that the United States has grasped the important legal issues raised by our petition but has failed to recognize the deleterious effect on civil antitrust enforcement that a denial of certiorari would

create. The legal issues raised by the petition vitally affect the application of the antitrust laws to major segments of the American economy--not just to the oil industry, but to all branded franchise operations. The essence of branded franchising is supplier control over the franchisee's economic activities. Our petition asks, for the first time, whether Illinois Brick should bar retail recovery in a market in which branded franchisees can purchase their branded product from only their franchisors, who conspired horizontally to raise the retail price level at which both the franchisors and the franchisees sold the product to the public.

When Hanover Shoe and Illinois Brick were decided, the Court could assume that restrictive practices by branded franchisors would always be

subject to attack by franchisees. But, in the wake of Continental T.V. v. G.T.E. Sylvania (1977) 433 U.S. 36, and this Court's present consideration of Monsanto Co. v. Spray-Rite Service Corp., Dkt. No. 82-914, and Copperweld Corp. v. Independence Tube Corp., Dkt. No. 82-1260,3/ which have allowed or might allow franchisors increased control over the competitive activities of their dealers, that potential challenge has been diminished and consequently antitrust

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3/Copperweld raises the question of whether a parent and a wholly owned subsidiary are independent economic units for the purposes of antitrust combination. By analogy, major oil company branded franchising of gasoline is arguably a single economic enterprise substantially controlled by the oil company.

enforcement has been weakened. The time is unquestionably ripe for a review of the way the Illinois Brick rule constrains the power of the dealers' customers to vindicate the antitrust laws. By this petition, we urge the Court to undertake this review.

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